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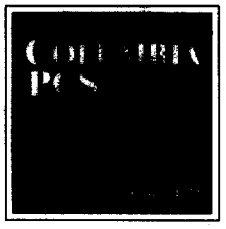

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 22, 1994

BY MESSENGER

Mr. William F. Caton
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

RE: Gen. Docket No. 93-253

Dear Mr. Caton:

Columbia PCS, Inc. ("Columbia PCS"), pursuant to comments 47 C.F.R.S. 1.415 and 1.419, Columbia PCS, Inc., hereby submits the attached Petition for Clarification.

Please direct any inquiries concerning this matter to the undersigned.

Sincerely,

John A. Malloy
General Counsel
703-518-1407

cc: The Hon. Reed Hundt
The Hon. James H. Quello
The Hon. Rachelle B. Chong
The Hon. Andrew C. Barrett
The Hon. Susan P. Ness
Mr. Donald Gips, Deputy Chief
Mr. Blair Levin, Esq.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	

PETITION FOR CLARIFICATION OF THE FCC'S FIFTH REPORT AND ORDER BY COLUMBIA PCS, INC.

John A. Malloy
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Director of Legal Affairs

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201 N. Union St., Suite 410
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PETITION FOR CLARIFICATION OF THE FCC'S FIFTH REPORT AND ORDER BY COLUMBIA PCS, INC.

PRELIMINARY STATEMENT

The FCC's Memorandum Opinion and Order dated June 13, 1994 and its Fifth Report and Order dated July 15, 1994 provide a sound regulatory framework to allow the long awaited dissemination of broadband PCS licenses via public auction beginning no later than November of 1994. The FCC's well-crafted policies are specifically designed to implement Congress' broad mandate for a more diverse, competitive and robust communications marketplace. Columbia PCS applauds the efforts of the Commission for what should prove to be a watershed event in the history of communications.

Given the scope of the FCC's Fifth Report and Order, Columbia seeks clarification on a number of detailed issues of great impact to PCS applicants, particularly potential bidders in 'entrepreneurial blocks' C and F. Clarification on these points is critical both to ensure applicants' compliance with these rules and to encourage

investments of the magnitude necessary to fund broadband PCS. Now that the FCC has created the broad regulatory framework, it is essential that the Commission add greater certainty to the implementation of that policy.

I. A BRIGHT-LINE OF 75% EQUITY AND 100% VOTING CONTROL FOR DESIGNATED ENTITIES IN THE CONTROL GROUP

The FCC's requirement for the creation and maintenance of a "control group" consisting of at least 25% equity and 50.1% voting control is sound policy. This mechanism attempts to balance the need to ensure that economic benefits flow to the intended beneficiaries with the practical concern that designated entities must seek funding from non-qualified entities to be financially viable. However, unduly restrictive interpretations of these rules can actually preclude formation of bona fide applicants, discourage reasonable passive investment, and drive away capital markets' support for designated entities. In forming and capitalizing applicant structures, designated entities confront economic realities dictated by the financial markets. Absent some reasonable clarification, the likely impact of the 25% control group equity requirement is that most, if not all, designated entities will be unable raise enough capital to successfully bid for broadband PCS licenses.

To solve this unintended dilemma, the FCC should clarify that not every identifiable interest within every control group investor is treated as a member of the control group. Just as passive investment is allowed to facilitate infusion of capital resources into the overall venture, some reasonable threshold of passive investment is needed within the control group as well. **A clear, bright-line requirement that at least**

75% equity and 100% voting interest in the control group be owned by designated entities would allow sufficient financial flexibility but still maintain the FCC's policy aims. Retention of 75% control group equity by those with 100% voting control would ensure true ownership interests of intended beneficiaries, discourage shams and still allow control group members to raise capital in themselves without risking their eligibility.[1] This bright line would be effective regardless of the control group structure of any applicant.

The 75% equity threshold is also consistent with the manner in which the Communications Act deals with alien ownership. In that context, the Act implicitly recognizes that the goal of maintaining domestic ownership is not excessively impaired by permitting up to 25% alien ownership in holding companies of licensees. The public interest is similarly served here by allowing flexibility in the underlying equity structure of control groups.

This bright line standard of at least 75% equity owned by designated entities in the control group eliminates any need to adjust the overall control group requirement of 25% equity. Applicants' financial requirements and organizational structures will vary dramatically with each individual applicant's circumstance. Rather than adjust the broader criteria to a fluctuating requirement, this clear standard will afford each applicant's control group sufficient latitude to create structures that fit their individual financing requirements.

[1] Any equity held by an ineligible person would be held in the form of non-voting stock, a limited partnership interest, or a beneficial trust interest, thus rendering the investor passive.

Columbia PCS believes that the suggested approach would provide members of control groups with access to badly needed capital, while still maintaining control and engendering bona fide ownership opportunities for designated entities. By taking this approach, the Commission would also minimize the risk that a *de minimis* investor in a sub-tier entity could somehow slip through and disqualify an applicant for reasons that are inconsequential from the standpoint of the Commission's policies. This approach provides the best resolution of the Commission's competing goals: assuring that designated entities can meaningfully participate in PCS as owner-operators, preventing abuse of the designated entity process, and generating a clear, bright-line test that will not enmesh the Commission and applicants in endless disputes over subjective judgments or practical trivialities.

II. INCREASED REVENUES, ASSETS OR PERSONAL NET WORTH OF CONTROL GROUP INVESTORS MUST BE ALLOWED

Rule 24.709(a)(3) correctly allows a **licensee** to maintain eligibility even if gross revenues, total assets or personal net worth(s) increase beyond current criteria (i.e. $125 million gross revenues, $500 million total assets, $100 million personal net worth, $40 million small business gross revenues) from non-attributable equity investments or ordinary business growth. This same common sense approach should be expressly extended to all control group investors; otherwise, the licensee would be forced to monitor and expel any control group investors that grow beyond these eligibility thresholds. A "snapshot" at the time of short-form should fix size measurements of a

licensee and all attributable interests with continuing eligibility still properly impacted by new attributable investors.

III. ADDITIONAL MANAGEMENT CONTRACTS STANDARD IS NEEDED

The Commission's Fifth Report and Order contains a footnote stating that "we shall not bar investors from entering into management contract with applicants." This seemingly innocuous comment belies the currently unsettled definition of permissible management contracts. Further clarification to supplement the Intermountain Microwave standard is imperative given the unsettled precedent of management contracts.[2] Unless the FCC further defines the proper scope of permissible management contracts, the tide of sham arrangements will overwhelm the Commission's ability to police them and affected parties could be embroiled in years of litigation.

Columbia PCS believes that the Commission should clarify its management contract policy under Intermountain Microwave to permit subcontractor arrangements for discrete functional responsibilities. Conversely, agreements reaching the level of a general contractor with complete system manager responsibilities should be deemed impermissible transfers of control. This standard supplement to Intermountain Microwave should apply to all third party management contracts.

Permitting passive investors to enter into management contracts with applicants increases the potential for abuse. Given this likelihood, it is important that the

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[2] See, e.g., Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F. 3d 42, 50 (D.C. Cir. 1994); Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F. 3d 655 (D.C. Cir. 1994).

Commission specify that all such management contracts should reflect fair market value derived from arm's length negotiations and any direct contractual ties to the licensee's revenues, profits or equity should be expressly prohibited.

Finally, the FCC should require audited reports at the time of long-form application certifying the "subcontractor" status of the relationship of any such management contracts entered into by a prospective PCS licensee as well as disclosure at time of short-form applications.

IV. AUCTION TIMING IS A CRITICAL COMPETITIVE ISSUE

Now that the Commission has created the broad regulatory framework needed to fulfill Congress' mandate for a more diverse, competitive and robust communications marketplace, **it is critical that the auction process begin no later than November**. Delays beyond November imperil the competitive potential of PCS. Although the recent narrowband auctions provided some insight into the auction process, it is clear that Congress' intent for greater competition was based upon the promise of wide dissemination of broadband PCS licenses.[3]

The record developed at the Panel Discussions held in April, 1994 by the PCS task force contains compelling market research demonstrating that delay in licensing until 1995 causes significant loss of market penetration for PCS. Yet even if the auction and licensing process was complete and initial authorizations for construction were issued this

[3] The Omnibus Budget Reconciliation Act of 1993 required the Commission to commence issuing licenses and permits in the Personal Communications Service (PCS) within 270 days of enactment, or May 7, 1994. Nowhere in the Act, its legislative history, or in the testimony before Congress, did anyone suggest this mandate could be met by anything less than broadband PCS.

November, PCS service would not be available to consumers until 1996 since construction alone is estimated to take 16 to 24 months.[4] Delays at this critical juncture damage the collective vision of Congress, the Commission and the pockets of the American public. Delays only benefit the handful of entrenched telecommunications giants currently enjoying the undue concentration of licenses that Congress sought to redress with the Omnibus Budget Reconciliation Act of 1993.[5]

A. NEW ENTRANTS IN BAND C MUST NOT BE COMPETITIVELY DISADVANTAGED

By definition, bidders in the C band auction will be primarily new entrants in telecommunications wholly dependent on revenues from new PCS service offerings. These new entrants will have the greatest need to build core network infrastructures, develop operating support systems, such as billing and customer service mechanisms, and create new consumer brands capable of succeeding in this highly competitive environment.

It is also obvious that PCS technology will be extraordinarily capital-intensive to deploy. Any reasonable business plan for broadband PCS must assume negative cash flows for the first several years of service operation. New entrants, particularly designated entities due to their higher costs of capital, will have the greatest financial pressures to begin operations to generate revenues. Any plan, no matter how well

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[4] The entire auction and licensing process as defined by the Commission is estimated to take 8 to 10 months from time of short form public notice until initial authorizations are issued. Although some system development and construction planning can take place during this time, the bulk of construction time must take place post auction.

[5] According to most industry sources, wireless communications is the fastest growing segment in the telecommunications industry. Cellular alone is estimated to have over 15 million subscribers generating more than $10 billion in revenues and annual growth of approximately 40% annually.

intentioned, that contemplates putting this class of individuals at a competitive disadvantage to the multi-billion dollar giants that dominate communications today is ill conceived. Yet, relegating "entrepreneurs" and designated entities to a second auction after the giant incumbents bid and win licenses in bands A and B appears to be where the Commission is headed. The hope that some of these giant incumbents, if unsuccessful in the A and B auctions, will then fund some bidders in the second auction is insufficient to justify the competitive disadvantage being foisted upon all new entrants in the C band auction. It is unconscionable to give these same well-heeled incumbents a 3 to 6 month headstart against their potential competitors in the race for PCS. Such a result would fly in the face of competition and effectively mute the impact of allowing entrepreneurs and designated entities to gain a foothold in communications.

B. THE A/B AUCTION AND C AUCTION MUST PROCEED ON DUAL TRACKS

The Commission should specify the time between the first and second broadband PCS auctions will be no more than two weeks. The FCC needs to clarify the timing of the second "C band" auction in order to allow qualified "entrepreneurs" to finalize their business plans and begin the difficult process of raising money now. Critical questions from financiers focus on how soon a prospective licensee can get to market and how many competitors it will face once it gets there. This definitive step by the Commission will provide certainty to potential investors and force all applicants to finalize realistic business plans. It is difficult enough as a entrepreneurial start-up to convince investors of our ability to compete with today's dominant telecommunications incumbents in a new market without having to overcome a several month headstart in

PCS as well. Entrepreneurial success is usually born from speed and responsiveness to market, and new entrants in PCS will need these entrepreneurial tools and more in order to succeed. Even if, and perhaps especially if, the competitors are of vastly different strengths and abilities, the Commission needs to make sure the starting line is at the same point in time for all.

Columbia PCS urges the Commission to recognize that both auctions can and should move on a dual track. It will take approximately 8 to 10 months from the time of short form filing to actual receipt of initial authorization to begin construction for any one auction. During that period there are at least 15 different process stages that can delay licensing and construction authorization even further. Network construction estimates then range from 16 to 24 months.

The Commission needs to establish a dual track that ensures that, at each stage of the auction and licensing process, the C band is no more than two weeks behind the corresponding A/B stage. For example, if the Public Notice Announcement for Short-Form Applications in Bands A/B is released on October 1, then the Public Notice for Short-Form Applications in B and C still must be released no later than October 15. Ultimately, this process should conclude with Initial Authorizations being issued for Bands A/B on approximately June 1, 1995 and Band C no later than June 15, 1995. At that point, the race to build and offer PCS should go to the competitors with the best preparation, quickest reactions and most motivation to succeed.

CONCLUSION

The Commission has indeed done much of the heavy lifting needed to fulfill Congress' ambitious intent for broadband PCS. The FCC's Fifth Report and Order has established a sound regulatory framework capable of engendering a more diverse, competitive and robust communications marketplace.

However, further clarification is needed. The Commission must move quickly to clarify its rules with the brightest lines possible and commence broadband auctions by November 1, 1994. The competitive impact of timing, particularly upon entrepreneurs and designated entities, must be taken into account as the auction and licensing process moves forward. Even following this reasonable schedule means that consumers will not realize the benefits of PCS until late 1996. Delay is the common enemy of all but the few giant telecommunications providers currently benefiting from the undue concentration of wireless licenses.

Columbia PCS applauds the Commissions' efforts to date, anxiously awaits these important clarifications and looks forward to competing in the race to fulfill the promise of broadband PCS.

Respectfully submitted,

Columbia PCS, Inc.

By _____
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